**HOSSEIN SHAKERI**

**v.**

**PP & OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
ROHANA YUSUF JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEALS NO: B-05-319-11-2011,
B-05-320-11-2011 & B-05-317-11-2011]
30 DECEMBER 2013

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Knowledge - Whether inferred from conduct of accused persons - Whether proven without having to invoke presumption under s. 37(d) - Whether trial judge's misdirection in invoking presumption prejudiced accused persons - Whether possession made out - Whether trafficking proven*

***EVIDENCE:*** *Presumption - Drug trafficking - Whether knowledge proven without having to invoke presumption under s. 37(d) Dangerous Drugs Act 1952 - Whether trial judge's misdirection in invoking presumption prejudiced accused persons - Whether misdirection offended law on double presumption - Whether misdirection prejudiced accused persons*

***CRIMINAL PROCEDURE:*** *Appeal - Findings of fact by trial judge - Misdirection in invoking presumption under s. 37(d) Dangerous Drugs Act 1952 - Whether misdirection offended law on double presumption - Whether misdirection prejudiced accused persons - Whether trial judge considered evidence in totality - Whether convictions safe - Whether appellate interference warranted*

The three appellants who were Iranian nationals, upon their arrests at the Kuala Lumpur International Airport, were taken to Hospital Serdang where they were subjected to medical examination and foreign objects were detected in each of them. The discharge of the objects was induced and capsules containing methamphetamine were discharged. The appellants were therefore charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s. 39B(2) of the DDA for trafficking in dangerous drugs. At the end of the prosecution's case, having found that there was *mens rea* possession, the trial judge invoked

A s. 37(d) of the DDA to presume knowledge. Upon maximum evaluation of evidence and applying s. 180 of the Criminal Procedure Code, the judge found that a *prima facie* case had been made out against all the three appellants. In their defence, the appellants did not deny that they had swallowed the foreign
B object but claimed that they were not aware of what they had swallowed were in fact drugs. They also contended that they had come to Malaysia to look for employment. At the end of the trial, the trial judge found that the appellants had failed to raise any reasonable doubt on the prosecution's case and convicted the
C appellants. Hence, this appeal. The issues that were raised for the appellants herein were, *inter alia*, that the trial judge had erred in: (i) failing to consider that the third appellant had no knowledge that he had swallowed drugs and that he was an innocent carrier; (ii) failing to accept the defence of the third appellant, together
D with the other appellants, that they had come to Malaysia to accept employment, simply on the basis that the appellants could not explain on their employment details; (iii) invoking a presumption of knowledge under s. 37(d) of the DDA against the appellants; and (iv) not considering that a case of trafficking had
E not been proven and at most, the first and second appellants may be convicted under s. 15 of the DDA.

**Held (dismissing appeals; affirming convictions and sentences) Per Rohana Yusuf JCA delivering the judgment of the court:**

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**(1)** There was no merit in the submission that there was no evidence to prove knowledge as 'knowledge' can be proven on circumstantial evidence. The appellants did not say that they were forced to swallow the capsules of drugs and neither did they deny to have swallowed them voluntarily. The conduct
G of swallowing the capsules of drugs voluntarily would entitle the court to infer knowledge. (paras 9-11)

**(2)** The strict requirement of knowledge on the part of the appellants must be qualified by the doctrine of wilful blindness.
H The appellants, in saying that they were not aware of what they were swallowing, could not set aside the doctrine of wilful blindness because they had the opportunity to find out what they were swallowing. If they chose not to, then the law could not be seen to protect their own folly. Therefore, on
I the facts and circumstances of this case, even without invoking s. 37(d) of the DDA, knowledge could be easily inferred from the surrounding facts. (para 13)

**(3)** Although the trial judge had misdirected in invoking the presumption under s. 37(d) of the DDA on knowledge, it would not make any difference to the finding on the facts of the case in the light of the fact that the appellants had the knowledge of what they had swallowed were drugs. The misdirection was of no consequence to the prosecution nor would it prejudice the defence case because it did not offend the law on double presumption as the charge of trafficking had been founded on direct evidence of trafficking under s. 37(d) of the DDA and also because of the presence of clear evidence on knowledge. (paras 14 & 15)

**(4)** The inference of knowledge on the facts and circumstances of this case was too overwhelming that despite misdirection by the trial judge in invoking s. 37(d), there was no reason for interference by the appellate court with his finding (*Tunde Apatira & Ors v. PP*; foll). (para 16)

**(5)** Having established that the appellants had the necessary knowledge and hence were in possession of the drugs in question, the appellants were trafficking in drugs pursuant to s. 2 of the DDA. As shown in their boarding passes, they were transporting drugs when they were flying from Dubai to Malaysia. Therefore, the suggestion and submissions for the appellants that a trafficking case was not made out against each of the appellants was devoid of merit. (para 17)

**(6)** The trial judge had given due consideration to the defence raised in his grounds of judgment and had analysed the defence by deliberating on a totality of evidence. Hence, there was no appealable error to warrant interference with the judge's findings. On a totality of the evidence, the convictions of all the three appellants were safe. (para 19)

***Bahasa Malaysia*** *Translation Of Headnotes*

Ketiga-tiga perayu yang merupakan warganegara Iran, selepas penangkapan mereka di Lapangan Terbang Antarabangsa Kuala Lumpur, telah dibawa ke Hospital Serdang di mana mereka menjalani pemeriksaan perubatan dan bahan-bahan asing dikesan dalam setiap seorang daripada mereka. Pengeluaran bahan-bahan tersebut didorong dan kapsul-kapsul yang mengandungi methamphetamine dikeluarkan. Perayu-perayu, oleh itu, dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dihukum di bawah s. 39B(2) ADB bagi pengedaran dadah

berbahaya. Di akhir kes pendakwaan, selepas mendapati wujudnya *mens rea* milikan, hakim bicara membangkitkan s. 37(d) ADB bagi anggapan pengetahuan. Selepas penilaian maksimum keterangan dan menggunapakai s. 180 Kanun Tatacara Jenayah, hakim mendapati bahawa kes *prima facie* telah dibuktikan terhadap ketiga-tiga perayu. Dalam pembelaan mereka, perayu-perayu tidak menafikan bahawa mereka telah menelan bahan-bahan asing tersebut tetapi menyatakan bahawa mereka tidak menyedari bahawa apa yang ditelan itu adalah sebenarnya dadah. Mereka juga menghujahkan bahawa mereka telah datang ke Malaysia untuk mencari pekerjaan. Di akhir perbicaraan, hakim bicara mendapati bahawa perayu-perayu telah gagal membangkitkan sebarang keraguan munasabah terhadap kes pendakwaan dan mensabitkan perayu-perayu. Maka, rayuan ini. Isu-isu yang dibangkitkan bagi perayu-perayu adalah, antara lain, bahawa hakim bicara khilaf atas: (i) kegagalan mempertimbangkan bahawa perayu ketiga tidak mempunyai pengetahuan bahawa dia telah menelan dadah dan bahawa dia adalah pembawa yang tidak bersalah; (ii) kegagalan menerima pembelaan perayu ketiga, bersama-sama dengan perayu-perayu lain, bahawa mereka datang ke Malaysia untuk menerima pekerjaan atas alasan bahawa perayu-perayu tidak dapat menjelaskan butiran pekerjaan mereka; (iii) membangkitkan anggapan pengetahuan di bawah s. 37(d) ADB terhadap perayu-perayu; dan (iv) tidak mempertimbangkan bahawa suatu kes pengedaran tidak dibuktikan dan paling banyak pun, perayu-perayu hanya boleh disabitkan di bawah s. 15 ADB.

**Diputuskan (menolak rayuan-rayuan; mengesahkan sabitan dan hukuman)**

**Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:**

**(1)** Tidak ada merit dalam hujahan bahawa tidak ada keterangan untuk membuktikan pengetahuan kerana 'pengetahuan' boleh dibuktikan melalui keterangan ikut keadaan. Perayu-perayu tidak menyatakan bahawa mereka telah dipaksa menelan kapsul-kapsul dadah tersebut dan mereka tidak menafikan bahawa mereka telah menelannya secara sukarela. Tindakan menelan kapsul-kapsul dadah secara sukarela mewajarkan mahkamah membangkitkan pengetahuan.

**(2)** Keperluan ketat pengetahuan pada pihak perayu-perayu perlu dibataskan oleh doktrin kebutaan sengaja. Perayu-perayu, dalam menyatakan bahawa mereka tidak menyedari tentang apa

yang telah mereka telan, tidak boleh mengenepikan doktrin kebutaan sengaja kerana mereka mempunyai peluang untuk mengetahui apa yang ditelan. Jika mereka memilih untuk tidak mengetahuinya, maka undang-undang tidak boleh dilihat melindungi kealpaan mereka sendiri. Oleh itu, atas fakta dan hal keadaan kes ini, walaupun dengan tidak membangkitkan s. 37(d) ADB, pengetahuan boleh disimpulkan daripada fakta sekeliling.

**(3)** Walaupun hakim bicara telah tersalah arah dalam membangkitkan anggapan di bawah s. 37(d) ADB atas pengetahuan, ia tidak akan membawa apa-apa perbezaan kepada dapatan fakta kes ini berdasarkan fakta bahawa perayu-perayu mempunyai pengetahuan bahawa apa yang telah mereka telan adalah dadah. Salah arahan tersebut tidak memberi kesan kepada pendakwaan dan tidak memprejudiskan kes pembelaan kerana ia tidak melanggar undang-undang anggapan berganda kerana pertuduhan pengedaran telah dibuktikan melalui keterangan langsung pengedaran di bawah s. 37(d) ADB dan juga kerana kewujudan keterangan yang jelas mengenai pengetahuan.

**(4)** Inferens pengetahuan atas fakta dan keadaan kes ini adalah amat ketara hinggakan walau terdapat salah arahan oleh hakim bicara dengan membangkitkan s. 37(d), tidak ada alasan bagi campur tangan mahkamah rayuan dalam dapatannya (*Tunde Apatira & Ors v. PP*; diikuti).

**(5)** Setelah membuktikan bahawa perayu-perayu mempunyai pengetahuan yang diperlukan dan dengan itu mempunyai milikan dadah tersebut, perayu-perayu mengedar dadah tersebut berikutan s. 2 ADB. Seperti yang ditunjukkan dalam pas masuk mereka, mereka membawa dadah apabila mereka dalam perjalanan dari Dubai ke Malaysia. Dengan itu, cadangan dan hujahan-hujahan bagi perayu-perayu bahawa kes pengedaran tidak dibuktikan terhadap setiap perayu adalah tidak bermerit.

**(6)** Hakim bicara telah memberikan pertimbangan yang sewajarnya kepada pembelaan yang dibangkitkan dalam alasan penghakimannya dan telah menganalisa pembelaan tersebut dengan mempertimbangkan pembelaan atas keseluruhan keterangan. Dengan itu, tidak ada kekhilafan yang boleh dirayu untuk mewajarkan campur tangan dalam dapatan hakim bicara. Atas keseluruhan keterangan, sabitan ketiga-tiga perayu adalah selamat.

**Case(s) referred to:**
*Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC* ***(refd)***
*Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 SC* ***(refd)***
*PP v. Hla Win [1995] 2 SLR 424* ***(refd)***
*Syed Ali Syed Abdul Hamid & Anor v. PP [1982] CLJ 188A; [1982] CLJ (Rep) 340 FC* ***(refd)***
*Teh Hock Leong v. PP [2008] 4 CLJ 764 CA* ***(refd)***
*Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC* ***(foll)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, s. 180
Dangerous Drugs Act 1952, ss. 2, 15, 37(d), (da), 39B(1)(a), (2)

*For the 1st & 2nd appellants - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co*
*For the 3rd appellant - Kitson Foong; M/s Kit & Assocs*
*For the prosecution - Yusaini Amer Abd Karim; DPP*

*[Appeals from High Court, Shah Alam; Criminal Appeals No: 45A-130-2010; 45A-132-2010 & 45A-133-2010]*

*Reported by S Barathi*

## JUDGMENT

**Rohana Yusuf JCA:**

**[1]** The three appellants were Iranian nationals. They were separately charged but jointly tried at the Shah Alam High Court, for trafficking in dangerous drugs namely methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA) and punishable under s. 39B(2) of the same Act.

**[2]** The amount of drugs that each one of them was charged for trafficking differed. The first appellant Hossien Shakeri was charged with an offence of trafficking 87.9g, the second appellant Mahdi Afrasiabi was charged with trafficking of 306g and the third appellant Arshad Mohammad Senjedeh was charged with trafficking of 466g of methamphetamine, respectively.

**[3]** The three appellants were arrested at the Kuala Lumpur International Airport and were taken to Hospital Serdang, where they were subjected to medical examination. X-rays were taken of their abdomens. Foreign objects were detected in each of them. Enema was administered into the rectum of all the appellants, which induced the discharge of the foreign objects into the respective bed pans marked in respect of each of them. The first

appellant discharged 18 capsules with content of 87.9g of methamphetamine marked as exh. P12. The second appellant discharged 71 capsules containing 306 grams of methamphetamine (exh. P13) and the third appellant discharged 70 capsules containing 466 grams methamphetamine marked as exh. P14.

**[4]** At the end of the prosecution case the learned trial judge found there was *mens rea* possession when the drugs were found in their abdomens. The learned judge invoked s. 37(d) of the DDA to presume knowledge. Having given a maximum evaluation of evidence before him and having applied s. 180 of the Criminal Procedure Code the learned judge found that a *prima facie* case has been made out against all the three appellants. They were then ordered to enter their defence. All the three appellants elected to give evidence on oath.

**[5]** The three appellants did not deny they swallowed the foreign objects found in their abdomens but they claimed they were not aware that what they swallowed were in fact drugs. All the three appellants said they came to Malaysia to look for employment offered by one Babak, a fellow Iranian. In consideration of the air tickets to Malaysia they were told to swallow the capsules containing 'body building powder'. They claimed to have been offered employment as a mechanic, a welder and a computer salesman, respectively.

**[6]** At the end of the trial, the learned trial judge found that the appellants failed to raise any reasonable doubt on the prosecution's case. In his grounds of judgment the learned judge found all the three appellants are not conversant in either English or Bahasa Malaysia; they were not aware what salaries they would be paid; they did not produce employment letters but claimed that the employment letters were in the baggage. Further to that the learned judge found that the appellants never disclose to the Investigating Officer that they came to Malaysia to take up the employment offered to them. Having considered the facts, the learned judge said the explanation by the appellants could not be accepted. For these reasons the learned judge found the defence had failed to raise any reasonable doubt on the prosecution case. Consequently, the learned judge convicted all the three appellants.

**[7]** The three petitions of appeal by the appellants raised a number of grounds. At the hearing of the appeal before us, learned counsel for the third appellant Encik Kitson Fong limited his submission to two main issues. He submitted, the trial judge

A erred in not having considered that the third appellant is denied of any knowledge of what he swallowed were drugs and that he was an innocent carrier. The second ground raised is on the alleged failure of the learned judge in not having accepted the defence of the third appellant, together with the other appellants, that
B they came to Malaysia to accept employment, simply on the basis that the appellants could not explain on their employment details.

**[8]** In addition to the above, for the first and the second appellants, learned counsel Encik Hisyam Teh Poh Teik confined
C the grounds of appeal to another two main issues. He submitted that the learned judge wrongly invoked a presumption of knowledge under s. 37(d) of the DDA, against the appellants. He cited in authority the Federal Court decision of *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] CLJ 188A; [1982] CLJ (Rep)
D 340; [1982] 1 MLJ 132. Secondly, he contended the learned judge erred in not considering that a case of trafficking has not been proven and if at all. He submitted that at most the first and second appellants may be convicted under s. 15 of the DDA instead.

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**[9]** The facts of the present case revealed that all the three appellants did not deny that they swallowed the capsules of drugs, which were found in their abdomens. They did not say that they were forced to swallow them and did not deny that they
F swallowed them voluntarily. The amount of drugs found in the abdomens of each of the appellants is too large for a case of own consumption.

**[10]** We do not find merits in the submission of both learned counsel that there was no evidence to prove knowledge. We agree
G with the learned trial judge when he states in his grounds of judgment that "knowledge" can be proven on circumstantial evidence.

**[11]** We find on the facts and circumstances of the present case,
H relying on the conduct of swallowing voluntarily, would entitle the court to infer knowledge. There are decided cases of similar nature where the accused swallowed drugs, such as the Federal Court case of *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597, the Court of Appeal decision in *Kasanda Emmanuel v. PP* [2010] as
I well as *Tunde Apatira v. PP* [2001] 1 CLJ 381; [2001] 1 MLJ 259, which state this legal proposition. In all these cases the drugs were also found in the abdomens.

**[12]** In *Teh Hock Leong v. PP* [2008] 4 CLJ 764, it was held by the Federal Court that the method employed to convey or transport the drugs furnish evidence of knowledge. In this regard, SP9 (Dr. Siti Jusna@ Siti Sharifah bt. Muhammad, a radiologist) testified that the capsules discharged were "ketulan bujur objek putih sausage shape dan sekeliling objek ada jalur hitam". All the three appellants swallowed these capsules voluntarily and in our view these surrounding facts inferred that the appellants know that they swallowed capsules of drugs.

**[13]** Given the facts as they are, we agree with the learned DPP (Encik Yusaini Amer b. Abd Karim) that there was no necessity to invoke any presumption on knowledge. It must be emphasised that the strict requirement of knowledge on the part of the appellants must be qualified by the doctrine of wilful blindness. It is a doctrine where if a person shuts his eyes to the obvious simply because he does not want to know, he must be taken to know what he is doing. (see *PP v. Hla Win* [1995] 2 SLR 424). The appellants in saying that they were not aware of what they were swallowing, cannot set aside the doctrine of wilful blindness because they have opportunity to find out what they were swallowing. If they chose not to then the law cannot be seen to protect their own folly. Therefore on the facts and circumstances of this case, even without invoking s. 37(d) of the DDA, knowledge can be easily inferred from these surrounding facts.

**[14]** Following that we agree with Encik Hisyam's submission that the learned judge had misdirected in invoking the presumption under s. 37(d) of the DDA on knowledge. We have considered the authority cited by learned counsel on this issue in *Syed Ali bin Syed Hamid & Anor v. PP* [1982] CLJ 188A; [1982] CLJ (Rep) 340; [1982] 1 MLJ 132. Learned counsel sought to argue that in *Syed Ali* the Federal Court in relation to the word "anything whatsoever"' in s. 37(d) of the DDA would preclude the application of this section to the present case because the drugs were found in the bowel or rectum of the appellants, which cannot be described as "anything whatsoever" as envisaged in *Syed Ali*.

**[15]** Having said that we are however of the view that the misdirection of the learned judge in wrongly invoking s. 37(d), would not make any difference to the finding on the facts of the present case in the light of the fact as we have stated earlier that the appellants had the knowledge of what they had swallowed

were drugs. We find that such misdirection is of no consequence to the prosecution nor would it prejudice the defence case for two reasons. Firstly, even if the presumption under s. 37(d) was invoked by the learned judge it does not offend the law on double presumption because the charge of trafficking has been founded on direct evidence of trafficking under s. 2 and not by way of presumption of trafficking under s. 37(d) of the DDA. Secondly, the misdirection by the learned judge would not prejudice the appellant's case on this issue because of the presence of clear and overwhelming evidence on knowledge as we have alluded to in the earlier paragraphs herein.

**[16]** We are guided by the case of *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381; [2001] 1 MLJ 259 on this issue. The Federal Court held in that case that exceptionally, a conviction by a trial court would be upheld despite misdirection if a reasonable tribunal would have convicted a person on available evidence on a proper direction. The inference of knowledge on the facts and circumstances of this case is too overwhelming that despite misdirection by the learned judge in invoking s. 37(d) we see no reason to interfere with his finding. The factual inference that the appellants indeed possessed the necessary knowledge of what they swallowed were drugs, are overwhelming. In *Khoo Hi Chiang v. PP & Another Case* [1994] 2 CLJ 151 the Federal Court held that even in a case where the judge applied the wrong test when calling for the defence, the error was of no consequence and it did not vitiate the conviction, because even if he had applied the more stringent test, the result would have been the same having regard to the absolutely overwhelming nature of the case of the prosecution. No substantial injustice had actually occurred and the court applied the proviso to Courts of Judicature Act 1964 s. 60.

**[17]** Having established that the appellants had the necessary knowledge and hence were in possession of the drugs in question, we agree with the learned judge that relying on s. 2 of the DDA the appellants were trafficking in drugs. As shown in their boarding passes in exhs. P45, P54, P55 and P60, they were transporting drugs when they were flying from Dubai to Malaysia. The suggestion and submissions of learned counsel that a trafficking case was not made out against each of the appellants is therefore devoid of merit.

**[18]** This brings us to the submission of learned counsel on the failure of the learned judge to consider an offence of self-administering drugs under s. 15. In view of the amount involved the legal presumption under s. 37(da) remains unrebutted coupled with the fact that the appellants did transport the drugs from Dubai to Kuala Lumpur the case falls squarely within the definition of trafficking. The appellants had never raised in their defence and in fact their denial of knowledge is not consonant to a case of self-administration of drugs under s. 15 DDA. We therefore do not see any error by the learned judge on his alleged failure to consider the defence of self-administration under s. 15 of the DDA.

**[19]** We find the learned judge had given due consideration to the defence raised in his grounds of judgment. He had analysed the defence by deliberating on a totality of evidence before him. We find that there is no appealable error to enable us to interfere with the learned judge's findings. Having scrutinised the appeal records with care, we are satisfied that on a totality of evidence, the convictions of all the three appellants are safe. We therefore dismissed their appeals and affirmed the convictions and sentences by the High Court on all the three appellants.